

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 99B119

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD NELSON JAMES,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Hearing was held before Administrative Law Judge Robert W. Thompson, Jr. on April 25, 2000. Respondent was represented by Assistant Attorney General Cristina Valencia. Complainant appeared and represented himself.

Respondent called six witnesses: Thomas Delaney, Transportation Maintenance Worker; Donna Carr, Transportation Maintenance Worker; Robert Pasko, Senior Maintenance Worker; Roger Anderson, Highway Maintenance Foreman; Charles Loerwald, Maintenance Superintendent; and Matthew Reay, Regional Transportation Director for Region I (retired).

Complainant testified in his own behalf and also called as witnesses: Stephen Felix, Highway Maintenance Worker; Bryan Easley, former law enforcement officer; Donna Carr and Thomas Delaney.

Respondent's Exhibits 1 through 10 and complainant's Exhibits A, C, D, E, M and P were stipulated into evidence.

MATTER APPEALED

Complainant appeals a fourteen-day disciplinary suspension. For reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of available alternatives;
3. Whether complainant committed the acts for which discipline was imposed;
4. Whether complainant was discriminated against on the basis of gender.

PRELIMINARY MATTERS

On April 24, 2000, the day before hearing, respondent filed a motion to quash the subpoenas served upon complainant's three witnesses on grounds that the subpoenas had not been served with either a witness fee or payment for mileage.

At hearing, the motion was denied as premature, since the witnesses had not yet been called to testify. The witnesses, themselves, did not file a motion to quash. In the exercise of Board jurisdiction over witnesses who are present, all eight witnesses who had made themselves available for the hearing, including two of the three witnesses subpoenaed by complainant, were asked by the judge if they would remain available throughout the day to provide their testimony. All agreed to do so. Respondent's motion thus became moot.

Respondent's motion to take telephone testimony from two potential rebuttal witnesses was granted without objection. All witnesses were sequestered from the hearing room and were instructed to not discuss their testimony with anyone except counsel or complainant. Complainant and respondent's advisory witness were excepted from the sequestration order.

FINDINGS OF FACT

1. Complainant, Richard Nelson James, has been employed as a Highway Maintenance Worker I (HMW) for respondent, the Colorado Department of Transportation (DOT) Region I, for three years. An HMW is on-call 24 hours a day, seven days a week, subject primarily to being called in at any time during the winter to clear the roads of snow.
2. James was initially assigned to the Fairplay maintenance shop, which is the operating point for two patrols, Patrol 31 and Patrol 32, each with four employees during the wintertime and with different supervisors. James was assigned to Patrol 31. Robert Pasko supervised Patrol 32, but he would see James every day. Pasko reported to Roger Anderson, Senior Highway Maintenance Foreman for Region I. Anderson was the indirect supervisor of James.
3. Anderson and James did not like each other.

4. Shauna Dostal and Donna Carr were the only female Highway Maintenance Workers in Region I. Both were part of Patrol 32.

5. James did not get along with Dostal. He felt that the two women received preferential treatment because they were women. He was especially irked that Dostal did not have to change snowplow blades. At the time, Dostal was pregnant and worked under the approved medical restriction of not being able to lift more than ten pounds. Plow blades weigh more than ten pounds.

6. In early March 1999, Dostal and James "had some words." James went to Anderson and complained that the women were receiving preferential treatment. He was angered that Dostal did not have to change plow blades.

7. Anderson called a patrol meeting and talked about employees having more respect for each other. James, Dostal and Marvin Mundt, James' direct supervisor, were present. To Anderson, the matter was closed.

8. On March 23, 1999, Tom Delaney, HMW for Patrol 32, worked his shift from 8:00 a.m. until 4:30 p.m. He had been employed by DOT for three weeks as a permanent, part-time employee. Approximately between 9:00 p.m. and 10:00 p.m., James telephoned Delaney at home to have him come back to work because of snow. Delaney did so, "making a round" with the snowplow before seeing James in the shop.

9. In general conversation with Delaney at around 1:30 or 2:00 a.m., James was critical of his co-workers. James stated that he did not like Roger Anderson and that he would like to hide on Kenosha Pass, and when Anderson went by, shoot through his windshield and blow his head off. James said that if that did not work he would like to run Anderson over with a loader and bury him in the sand pile so he would not be found until spring.

10. Delaney knew that Anderson usually drove over Kenosha Pass on his way to work. James' statements made Delaney feel uncomfortable. He did not take them as a joke. At the time, he did not know of the conflict between James and Anderson.

11. At about 5:00 a.m. on March 24, Delaney told co-worker Donna Carr that James had made threats about killing Roger Anderson by waiting on Kenosha Pass and blowing his head off as he passed by and if that did not work by running him over with a piece of equipment and burying him in the sand shed. Delaney seemed sincere and scared. He told Carr that he thought James had been drinking.

12. Carr knew that James was a firearms instructor, was knowledgeable about guns and had access to guns. She believed that James

was capable of making good on the threat. As she thought about it, she became frightened and concerned. By 9:00 a.m., she went to Anderson and told him of the statements.

13. Delaney went home but came back in the afternoon to inform Robert Pasko, his supervisor, of the James statements. Delaney was concerned and visibly upset. He told Pasko that James was not joking and that his eyes were cold. Pasko responded that this had to go to Anderson.

14. After talking to Carr, Delaney and Pasko, Anderson wondered about his personal safety, since he drove through Kenosha Pass almost everyday. He was aware that James was a firearms instructor and had a knowledge of guns.

15. Anderson reports directly to Charles Loerwald, Section 5 Maintenance Superintendent of Region I, whom he had talked to about issues involving James, inclusive of James' adverse relationship with Shauna Dostal and other issues pertaining to James' job performance. Loerwald scheduled a meeting with James and Anderson, probably held on March 26. At the meeting, James complained that the women were not carrying their weight. It is unclear from the testimony as to exactly when or in what context, but at some point, Anderson told Loerwald of James' threatening remarks. Loerwald brought it to the attention of Matthew Reay, the Region I Director, who instructed Loerwald to place James on administrative leave with pay, which was done.

16. Having received copies of the written statements of Delaney, Dostal, Pasko and Carr (Exhibits 3, 4, 5 and 6), Region I Director Matthew Reay, the appointing authority, scheduled a March 29, 1999 R-6-10 meeting with James. At this predisciplinary meeting, issues related to the alleged statements, as well as interpersonal relationships and James' job performance, were discussed. James adamantly denied making any threatening comments whatsoever. Also discussed was a 1997 incident in which James was sanctioned with a pay suspension for reporting to work with an excessive blood-alcohol level. James suggested that Reay review the resulting report of the Substance Abuse Professional, and Reay agreed to do so.

17. Reay traveled from his office in Aurora to Fairplay to interview the personnel of both Patrol 31 and Patrol 32. He talked again to James, asking him to see Dr. Doris Gunderson, a psychologist at the University of Colorado Medical Center who was under contract with the Department of Transportation to provide advice on workplace violence issues. James consented.

18. Reay interviewed Thomas Delaney at some length and found him credible, Delaney having worked there for only a month or so and harboring no grudge or motive to fabricate the story or to harm James. There was no reason to disbelieve him, as far as Reay was concerned.

19. Reay concluded that some kind of serious threat had been made by James against Anderson. Noting DOT's policy of "zero tolerance" with respect to workplace violence, Reay concluded that James had violated DOT's Workplace Violence Policy Directive 10 (Exhibit 7), warranting disciplinary action. Reay took under consideration James' knowledge of, and access to guns, as well as the fact that James frequently talked about guns on the job. Some co-workers had reported to Reay that James told them he carried a handgun in his DOT vehicle; James told Reay that he was just joking when he said that. Donna Carr informed Reay that James had suggested to her that she, too, carry a handgun at work.

20. James' agreement to see Dr. Gunderson was a strong mitigating factor in Reay's decision to not impose the discipline of termination. The psychologist advised him that James did not pose a threat to his co-workers. The report of the Substance Abuse Professional was also a mitigating factor, as the report stated that alcohol abuse was not an issue for James, and the incident of coming to work with alcohol in his system was isolated.

21. Effective April 22, 1999, the appointing authority imposed a fourteen-day disciplinary suspension as punishment for the remarks concerning Anderson, which Reay found were either threatening or could be perceived as threatening. He transferred James to Patrol 44 in Frisco, having determined that the working relationship between James and Anderson and other members of Patrols 31 and 32 was beyond repair and had deteriorated to the point of damaging both morale and productivity. Reay also imposed a corrective action requiring James to attend a course in Conflict Resolution and Anger Management and calling for Charles Loerwald to monitor James' performance monthly for six months, with special attention being given to the area of interpersonal relations. (Exhibit 2.)

22. Complainant Richard Nelson James filed a timely appeal on May 3, 1999.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeak v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

An administrative agency abuses its discretion when the decision under review is not reasonably supported by any competent evidence in the record. *Van Sickie v. Boyes*, 797 P.2d 1267 (Colo. 1990). No competent evidence means that the agency's ultimate decision is so devoid of evidentiary support that the only explanation must be that the agency's action was an arbitrary and capricious exercise of authority. *Board of County Commissioners v. O'Dell*, 920 P.2d 48 (Colo. 1996).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Factors used in judging the credibility of a witness include the following:

- a) Means of knowledge.
- b) Recollection/eyewitness identification.
- c) Manner of testifying.
- d) Corroboration.
- e) Hostility.
- f) Character/moral turpitude.
- g) Motive, interest and bias.
- h) Inconsistent statements.
- i) Improbability of testimony.
- j) Prior inconsistent statements/contradiction.
- k) Mental incapacity.
- l) Inappropriate expertise/testimony too pat or flawless.

Implementing the above factors, I find that each of respondent's witnesses testified credibly. All presented no motive for bias or a hint of dishonesty. The testimony was internally and externally consistent. Certainly, the appointing authority's investigation was conducted with an open mind in search of the truth. The appointing authority objectively questioned the truthfulness of Tom Delaney and found him truthful.

Complainant unsuccessfully attacked Delaney's credibility at hearing by trying to insinuate that Delaney had something to gain from making dishonest statements, *i.e.*, Anderson's favor, charging that Delaney became a permanent full-time, rather than a part-time employee in April 1999 as a result of his false accusations. Yet, there is no credible evidence linking Anderson to Delaney's hiring or in any manner demonstrating favoritism towards Delaney by Anderson or anyone else. In fact, Delaney testified that he has since had disagreements with Anderson, and Anderson was instrumental in lowering his performance rating. Complainant introduced no credible evidence suggesting that Delaney benefited from the allegations or could have reasonably expected to benefit by

falsely accusing James of making threatening remarks. Delaney's accusations have stood the tests of time, consistency and cross-examination.

While Donna Carr testified that Delaney once lied to her and subsequently admitted that he had lied, she believed him in this instance because he seemed afraid, sincere and concerned. Two other witnesses testified that James, himself, was known to exaggerate and was known to be less than truthful, having falsified his time sheets on at least two occasions.

James agrees with DOT's Workplace Violence Policy Directive 10 and concedes that the alleged threats would fall within the purview of Directive 10, but he denies that the statements were ever made. The validity of Directive 10 is not an issue in this case.

James' statements, implicitly threatening at least, were inappropriate in the workplace and warrant discipline. At a minimum, the remarks generated anxiety among complainant's co-workers and managers and disrupted the work environment. The appointing authority properly and appropriately took all factors into account, inclusive of the mitigating factors of the favorable opinion expressed by the Substance Abuse Professional and by Dr. Gunderson. Respondent carried its burden under *Kinchen, supra*, *McPeak, supra* and *Van Sickle, supra*. Complainant did not directly challenge his transfer or the corrective action at hearing. Both are found proper.

An employee does not have to agree with a transfer in order for the transfer to have effect. Director's Procedure P-4-5, 4 Code Colo. Reg. 801, thus provides in pertinent part:

A transfer can be initiated by an employee or an appointing authority. . . . If the transfer is within the same agency, it is at the discretion of the appointing authority(s), and if the employee refuses it, the employee is deemed to have resigned. If the transfer is outside 25 miles, is longer than six months, and was not a condition of employment, the employee's name is placed on the reemployment list.

Complainant did not demonstrate, or even allege, that respondent was out of compliance with P-4-5.

The corrective action, fittingly, was "intended to correct and improve performance or behavior," was supported by the evidence and was properly administered. See Rule R-6-8, 4 Code Colo. Reg. 801.

With respect to his discrimination charge, complainant asserts that he was somehow discriminated against on the basis of gender, but he failed to show that the female maintenance workers were treated differently from the way male workers were treated, or that his fourteen-day disciplinary suspension was related in the slightest degree to his being male, or that the disciplinary action

would have been any different if he were female. All he offers is unfounded speculation and self-serving conjecture. Even his own witness, co-worker Stephen Felix, testified that James was not treated differently than the female workers and that James "exaggerates a lot."

An award of attorney fees and costs is not justified pursuant to Rule R-8-38, 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was within the realm of available alternatives.
3. Complainant committed the acts for which discipline was imposed.
4. Complainant was not discriminated against on the basis of gender.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
May, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, #1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar

days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of _____, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Richard Nelson James
P.O. Box 102
Alma, CO 80420

and in the interagency mail, addressed as follows:

Cristina Valencia
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
